United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20407

DAVID H. WHITTLESEY, et al.

Petitioners

v.

UNITED STATES,

Respondent

3568

PETITION FOR RECONSIDERATION EN BANC OF
DENIAL OF PETITION FOR ALLOWANCE OF APPEAL

On Petition For Allowance of Appeal From
The District of Columbia Court of Appeals

FRANK D. REEVES
HERBERT O. REID, SR.
Attorneys for Petitioners
P.O. Box 1121
Howard University School of Law
Washington, D. C. 20001
797-1395

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT

DAVID H. WHITTLESEY, et al, Petitioners	)	
v.	)	No. 20407
UNITED STATES, Respondent	)	

PETITION FOR RECONSIDERATION EN BANC
OF DENIAL OF PETITION FOR
ALLOWANCE OF APPEAL

Come now the petitioners herein, by counsel, and petition this Honorable Court, pursuant to Rule 10 of this Court's Rules Governing Appeals from the District of Columbia Court of Appeals and pursuant to Sections 43 (b) and 46 (c) of Title 28, United States Code, for reconsideration en banc of its Order entered herein on 21 October 1966 denying the Petition for Allowance of Appeal which sought review of the decision of the District of Columbia Court of Appeals in Whittlesey v. United States, 221 A. 2d. 86. As grounds for this Petition, it is submitted:

1. The Petition for Allowance of Appeal herein raises grave and important issues of substance involving fundamental constitutional rights, invoking the exception that en banc courts "should be convened 'only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit.' United States v. American Foreign S. S. Corp., 363 U. S. 685, 689, 80 S. Ct. 1336, 1339, 4 L. Ed. 2d 1491 (1960)." Earl v. United States, 364 F. 2d 666 (U. S. App. D. C., 1966).

2. The Petition for Allowance of Appeal should be granted for the following reasons:

(a) The holding by the District of Columbia Court of Appeals in the instant case that where the information went to the jury room without the knowledge of the Judge, or counsel, and hence without a proper instruction by the court, and without a determination by anyone as to what accompanied the information - attachments, notations, or otherwise - is a conclusion by the District of Columbia Court of Appeals on a matter of substance in a manner not in accord with applicable decisions of this Court and contrary to decisions of the Supreme Court of the United States.

The court below held that, although the information could not be given to the jury except upon the exercise of the sound discretion of the trial judge and after a proper instruction, there was no reversible error shown where the trial judge was prevented from exercising any discretion in the matter and where no instruction was given, and none requested because no one was aware of the error in delivering the information to the jury. The court concluded that this procedure was error, but that it could not hold that such error harmed the petitioners. Accordingly, the court below concluded that, in the trial of a matter where there is an absence of the "constitutional norm," "essential elements" or "minimal standards" of due process, the accused must demonstrate the harm which was actually occasioned by the absence of due process. This holding by the District of Columbia Court of Appeals in this matter does not comport with the established law. Turner v. State of Louisiana, 379 U. S. 466, 85 S. Ct. 546.

Further, petitioners were denied the procedural safeguards inherent in a "fair and impartial trial," and hence they were not in a position to determine accurately what did in fact go to the jury along with the Information or how it was harmful to them. The

opportunity for the petitioners to protect themselves in the matter was denied them by no fault attributable to them, as conceded by the court below. Nevertheless, that court concluded that petitioners could not object to the denial of these procedural safeguards without demonstrating that what occurred absent due process protection was harmful. The appellants, at the first opportunity after notice, in their motion for new trial objected to the fact that the Information had been sent to the jury without the knowledge of, and instruction by the trial court, and without an opportunity in open court to examine what was being delivered to the jury.

In Remmer v. United States, 347 U. S. 227, 229, the Supreme Court stated the rule applicable to the instant case as follows:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. Mattox v. United States, 146 U. S. 140, 148-150; Wheaton v. United States, 133 F. 2d 522, 527.

The trial court's failure to have a hearing on the issue of "harmful error," combined with the Government's position that it was immaterial whether what had taken place was, or was not, "harmful error," effectively denied these petitioners a due process opportunity to establish the exact fact which the court below now holds is material, and the petitioners cannot on appeal successfully complain because they have not shown facts which in the posture of this matter could not have been further shown. Gold v. United States, 352 U. S. 985, 77 S. Ct. 378. See Winebrenner v. United States, 147 F. 2d 322.

(b) This decision by the court below, insofar as it holds that the District of Columbia Unlawful Entry Statute (D.C. Code, 1961, §22-3102), is directly applicable to the White House without reference to the General Assimilation Statute (40 U.S.C. §101), involves questions of general importance and substance relating to the construction and application of statutes which have not been but should be settled by this Court.

(1) The instant case represents the first judicial determination that the local District of Columbia Unlawful Entry Statute applies to the White House without force of the District of Columbia General Assimilation Statute. Whether Congress intended the White

House, either by direct application or by assimilation, to be included within the coverage of the local unlawful entry statute is a question of grave national importance which should be decided by this Court. It is of equal importance for this Court to determine whether such application of the local unlawful entry statute is unconstitutional as a violation of the Separation of Powers Doctrine, as an unlawful infringement of the prerogatives of the Presidency, and as a denial of due process of law because the immunity of the President to civil process and availability of the executive privilege with reference to his staff denies defendant an opportunity to confront the witnesses against him and frustrates his preparation and presentation of an adequate defense to a criminal prosecution.

(2) In no prior decision by the court below or by this Court have the words "public buildings," in a statute or regulation pertaining to the District of Columbia, been held to extend to "public buildings...belonging to the United States within the District of Columbia," except by the force of the General Assimilation Statute (40 U.S.C., §101). Similarly, no prior decision by the court below or by this Court involving prosecution for an offense committed on property belonging to the United States within the District of Columbia,

where the statute under which the offense was charged did not expressly extend its coverage to such property, has approved imposition of a penalty other than that provided in 40 U.S. Code, §101. See, Feeley, et al v. D.C., 220 A. 2d 825 (1966), Jalbert, et al v. D.C., 221 A. 2d 94 (1966), Smith v. D.C., 219 A. 2d 842 (1966).

(c) The approval by the court below of the failure of the trial court to employ its process to compel the attendance of witnesses sought by the petitioners represents such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision. Moreover, the court below has decided a question of fundamental constitutional importance in a manner inconsistent with the applicable decisions of this Court and the Supreme Court of the United States and this Court's refusal to review the decision below creates a situation in which the existing local law is in apparent conflict. This Court in the exercise of its supervisory power should not allow the decision of the court below to stand without a full and complete examination.

(1) Prior to the commencement of the trial petitioners requested that subpoenas issue for the attendance of four White House assistants who had conversed with petitioners while petitioners were

in the White House. The trial court at no time gave any reason for the denial of this request. On appeal the Government argued, without support in the Record, that at the trial petitioners had requested a continuance and that the continuance had been denied in the exercise of the sound discretion of the trial court. The court below sustained the denial of petitioners' motion for issuance of subpoenas on the ground of petitioners' failure to indicate the relevance of the expected testimony. Thus, the court below has established a condition precedent to the right of one accused of crime to utilize the process of a trial court to compel the attendance of a witness.

United States v. Burr, 25 Fed. Cas. 30 (Case No. 14, 692a) (1807), held that petitioners' right to compulsory process is a very substantial and fundamental right which the Court should safeguard with meticulous care. See also Paoni v. United States, 281 F801 (1922); Feguer v. United States, 302 Fed. 214 (1962); Bridwell v. Aderhold, 13 F. Supp. 253 (1935). This Court should not, through self-imposed restraint in refusing to exercise its supervisory powers, allow the basic right of compulsory process to be eroded away by exception and condition. Gideon v. Wainright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938); Avery v. Alabama, 308 U.S.444

(1940); Smith v. O'Grady, 312 U.S. 329 (1941). Rather, this Court should be diligent to protect the right of the accused to compulsory process. Washington v. Clemmer, 339 Fed. 715 (1964); Greenwell v. United States, (U.S. App. D.C.) 317 F. 2d (1963).

The applicable rule is correctly stated in United States v. Seeger, 180 F. Supp. 467 (S.D.N.Y., 1960):

> Under the Sixth Amendment to the Constitution a defendant accused of crime is guaranteed the right to compel the attendance of witnesses. Who these witnesses shall be is a matter for the defendant and his counsel to decide. It does not rest with the prosecution or the person under a subpoena. The defendant may not be deprived of the right to summon to his aid witnesses who it is believed may offer proof to negate the Government's evidence or to support the defense.
>
> The materiality of a witness' proferred testimony must rest with the trial judge after the witness has been sworn....(Emphasis supplied)

In the light of this heretofore accepted constitutional standard, the court below's imposition of the unconstitutional condition that an accused must first satisfy the trial court of the relevancy of anticipated testimony before he may secure the aid of the court to compel the attendance of the requested witness, requires the exercise of this Court's supervisory power.

(2) Moreover, the trial court's refusal to employ its process to compel attendance of requested witnesses, who were acknowledged to have the power and authority to countermand any order or demand issued by Major Stover and who did converse with petitioners while they were in the White House, raises grave questions of constitutional significance involving frustration of petitioners' opportunity to assert a defense recognized by the court below - viz. that their alleged trespass was committed under a bona fide belief of right to remain in the premises.

(d) The decision by the court below upon the issues raised by the trial court's interpretation and construction of the Unlawful Entry Statute (D.C. Code 1961, §22-3102), poses questions of substance relating to the construction and application of a statute in the District of Columbia which have not been, but should be, settled by this court.

From the enactment on March 3, 1901, of 21 Stat. 1324 ch. 854 §824 until the amendment of July 17, 1952, 66 Stat. 766 ch. 941 §1 (codified as D.C. Code 1961, §22-3102), it was a crime only if a person failed to leave the <u>private property</u> of another in the District of Columbia after the <u>lawful occupant</u> ordered him to do so. By the

1952 amendment, the statute was extended to cover any public building and, to meet those situations in which there was no lawful "occupant" of same, the phrase "person lawfully in charge thereof" was included. No prior decision by this Court or the court below since the 1952 amendment has construed or applied the Unlawful Entry Statute in the context of the White House or other public building owned by the United States. Thus, the interpretations in this case by the court below: that "the person lawfully in charge" is synonymous with "the logical person in charge;" that "the person lawfully in charge" may, in actuality, be any one of a multiplicity of persons, any one of whom may issue a lawful order to quit the premises; that, in the presence of the "lawful occupant" another person, without establishing his agency or direct authority from the "lawful occupant," may be "the person lawfully in charge" of the premises, the affront to whose will and disobedience of whose demand will invoke the penal consequences of the statute; all raise questions of first impression and substance for resolution by this Court involving the vulnerability of the statute to attack upon the ground of unconstitutional vagueness. See Winters v. New York, 333 U.S. 507 (1948); Herndon v. Lowry, 301 U.S. 242 (1937); Cline v. Fink Dairy Co., 274 U.S. 445 (1927).

WHEREFORE, counsel for petitioners certifying that this petition is presented in good faith and not for delay, petitioners request that the Court, en banc, reconsider and set aside the Order of 21 October 1966 denying their Petition for Allowance of Appeal and that the said Petition be granted.

FRANK D. REEVES
HERBERT O. REID, SR.
Attorneys for Petitioners
P.O. Box 1121, Howard University
Washington, D. C. 20001
797-1582

CERTIFICATE OF SERVICE

I hereby acknowledge service and receipt, this 28th day of October 1966, of a copy of the foregoing Petition for Reconsideration En Banc of Denial of Petition for Allowance of Appeal.

UNITED STATES ATTORNEY FOR THE
DISTRICT OF COLUMBIA

By_____
Assistant United States Attorney
Attorney for Respondent